IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 25TH JULY 2007 / 3RD SRAVANA 1929

CRL.A.No. 979 of 2007(B)

SC.1097/2006 of SESSIONS COURT, KOLLAM

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APPELLANT/ACCUSED:

SHAJAHAN, S/O.SUKUMARAN
C.NO. 1425
CENTRAL PRISON, TRIVANDRUM

BY ADV. ADV.K.M.JAMALUDHEEN(STATE BRIEF)

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 25/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO.979 OF 2007

Dated this the 25th day of July, 2007

JUDGMENT

The sole accused in S.C. No.1097 of 2006 on the file of the Sessions Court, Kollam is the appellant. The appellant faced trial for the offence punishable under Section 376(2)(f) I.P.C. and Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Act").

2. The prosecution case against the appellant was that on 26.1.2006, the appellant committed rape on a two and a half year old child, the daughter of PWs.3 and 4. The further case of the prosecution is that as the victim and her parents belong to Scheduled Caste community and the appellant belongs to a forward cast, he committed offence under Section 3 (1)(xii) of the Act. To prove the case against the appellant, the prosecution examined PWs.1 to 9 and produced Exts.P1 to P13 as well as MOs.1 to 3. The accused when questioned under Section 313 Cr.P.C. denied the charges levelled against him and stated that the case was foisted

against him by PWs.3 and 4 due to previous enmity as he used to tell the people regarding the illicit relationship that PW.3 had with CW.4, one Babu. However, relying on the prosecution evidence, the trial court found the appellant guilty under Section 376(2)(f) I.P.C., convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.10,000/- and in default of payment of fine, to undergo simple imprisonment for a further period of one year. It was further ordered that if the fine amount was realised, the same shall be paid to PWs.3 and 4, the parents of the victim as compensation. The accused was allowed set off as per law. As the prosecution failed to prove the case against the appellant under Section 3 (1)(xii) of the Act, the trial court acquitted the accused of that charge.

3. This appeal is filed through the jail authorities and hence, the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor for and on behalf of the State.

4. Learned counsel appearing for the appellant raised the following contentions: (i) the trial committed serious error in accepting the evidence of PWs.3 and 4, the parents of the victim, to find the appellant guilty under

Section 376(2)(f) I.P.C., (ii) the trial court had not considered the evidence of PW.1 and the other medical evidence including Ext.P12 chemical examination report as the evidence of PW.1 does not show that there was any evidence of rape, (iii) the trial court ought to have found that the case was foisted against the appellant due to previous enmity between the appellant and the parents of the victim as can be seen from the delay caused in filing the complaint before the police and (iv) the sentence awarded against the appellant is excessive.

5. The prosecution relies on the evidence of PWs.3 and 4, the parents of the victim. PW.3, the mother of the victim stated that on the date of the incident, the accused came to her house and took the child to his house and that after sometime, she heard the child crying and that when she called out to the accused as to what had happened, he said the child fell down. She further stated that when she called out to the child, the child came to her crying and that when she asked the child as to what had happened the child told her about the pain in her private part. This witness further stated that when she removed the dress of the child in order to bathe her, she found some sticky substance on the thighs of the child and slight bleeding from the private part. Further, this witness stated that she

bathed the child and when PW.4, her husband, came home in the night, she disclosed the incident to him.

6. The father of the victim, PW.4, stated that he had gone for work on the date the incident and that when he came back from work at night, his wife disclosed the incident to him. He further stated that though he and his wife had decided to keep silent about the incident considering the future of the child, on the advise of his employer, he gave Ext.P3 first information statement before the police which was recorded by PW.8, the Sub Inspector of Police. It is further stated by this witness that PW.8 asked PW.3 and a woman constable to take the child to the hospital for medical examination.

7. PW.1, the doctor who was working at the Government hospital, Kadakkal during the relevant time had given evidence to the effect that the child was brought to her on 28.1.2006 and after examining the child, she issued Ext.P1 medical certificate. This witness stated in cross-examination that there was congestion over the inner aspect of labia minora. Even though PW.1 stated in cross-examination that she cannot say whether there was penetration or not, in Ext.P1 medical certificate she had categorically stated that there was evidence of penetration of the

vagina.

8. The trial court considered the evidence of the above witnesses and also Ext.P12 chemical examination report. As per Ext.P12 report, human spermotozoa were detected in item Nos. 1 and 3, a small midi skirt and lungi respectively. Learned counsel appearing for the appellant submits that the recovery mahazar was not properly prepared by the investigating officer. The trial court, however, accepted the evidence of PWs.1 and 9 and Exts.P1 and P12 and found that the prosecution succeeded in proving the case against the accused.

9. The question **to** be considered in this appeal is whether the evidence adduced in the case would show that the appellant committed the offence punishable under Section 376 I.P.C.

10. Section 375 I.P.C. reads as follows:

> "**Rape**.-- A man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-
>
> First.-- Against her will.

Secondly.-- Without her consent.

Thirdly.-- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.-- With her consent , when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-- With or without her consent, when she is under sixteen years of age.

Explanation.-- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

To constitute an offence under this section, it has to be proved by the

prosecution that there was penetration. The contention of the learned counsel appearing for the appellant is that PW.1, the doctor who had examined the victim was not sure whether there was penetration or not. Counsel further submits that the evidence of PW.3, the mother of the victim and that of PW.8 who recorded Ext.P3 first information statement would not show that there was any external injury on the body of the victim and that if there was any external injury, PW.1 would have noted down in Ext.P1 medical certificate.

11. It is seen from Ext.P1 medical certificate that there was congestion over the inner aspect of labia minora. Mosby's Medical Dictionary defines `labia minora' as the two folds of skin between the labia majora, extending from the clitoris backward on both sides of the vaginal orifice, ending between it and the labia majora. No doubt, PW.1 had noted congestion over the inner aspect of labia minora of the victim. Even though there is no evidence to show that there was full penetration, the evidence of PW.1 and Ext.P1 medical certificate would show that there was partial penetration which caused injury on the body of the victim. Apart from that, as per Ext.P12 chemical examination report, human spermotozoa were detected in item Nos. 1 and 3, a small midi skirt and lungi respectively. In this context, the evidence of PW.3, the mother of

the victim assumes relevance. She had stated that when she removed the dress of the child in order to bathe her, she found some sticky substance on the thighs of the child and slight bleeding from the private part. In the above circumstances, the conclusion arrived at by the trial court that there was penetration, though partial, is correct and the finding of the trial court that the appellant committed offence punishable under Section 376(2)(f) I.P.C. requires no interference by this Court.

12. The next question to be considered is regarding the sentence awarded by the trial court. Learned counsel appearing for the appellant submits that the sentence awarded by the trial court is excessive. The appellant had committed rape on a two and a half year old child. It is a heinous crime which does not call for any leniency. Considering the nature of the offence committed by the appellant, this Court is of the view that the sentence awarded by the trial court is not at all excessive.

The Crl. Appeal is accordingly dismissed, confirming the conviction entered and the sentence awarded by the trial court.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.APPEAL NO.979/2007

JUDGMENT

25TH JULY, 2007